

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 02-0451 CSET
CONTROLLED SUBSTANCE EXCISE TAX
FOR TAX PERIOD: 2001**

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ISSUE

1. Controlled Substance Excise Tax: Imposition

Authority: IC 6-7-3-5. IC 6-8.1-5-1 (b), Hurst v. Department of Revenue, 720 N.E.2d 370 (Ind. Tax. 1999), Hall v. Department of Revenue, 720 N.E.2d 1287 (Ind. Tax. 1999).

The taxpayer protests the imposition of the Controlled Substance Excise Tax.

Statement of Facts

On August 1, 2001, police discovered marijuana in a car belonging to the taxpayer. On April 12, 2002, the appropriate County Prosecuting Attorney sent the Indiana Department of Revenue, hereinafter referred to as the "department," a request for the assessment of controlled substance excise tax relating to the defendant's possession of marijuana. The department issued a Record of Jeopardy Finding, Jeopardy Assessment, Notice and Demand on August 14, 2002 in a base tax amount of \$71, 864.10. The taxpayer filed a protest to the assessment. A hearing on the protest to the imposition of the controlled substance excise tax was held on October 29, 2002.

1. Controlled Substance Excise Tax: Imposition

Discussion

IC 6-7-3-5 imposes the Controlled Substance Excise Tax on the possession of marijuana in the State of Indiana. Departmental assessments are presumed to be correct and the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1 (b).

Possession of marijuana subject to the imposition of the tax can be either actual or constructive. Hurst v. Department of Revenue, 720 N.E.2d 370 (Ind. Tax. 1999), Hall v. Department of Revenue, 720 N.E.2d 1287 (Ind. Tax. 1999). Although both direct and circumstantial evidence may prove constructive possession, proof of presence in the vicinity of drugs, presence on property where drugs are located, or mere association with the possessor is not sufficient. Hurst at 374-375. To prove constructive possession, there must be a showing that the taxpayer had not only the requisite intent but also the capability to maintain dominion and control over the substance. Hurst at 374.

In the Hall case, the Indiana Department of Revenue assessed Controlled Substance Excise Tax on a husband and wife. The couple owned and lived together in a residence. The marijuana was grown in a basement room with a locked door. Only the husband had a key to the room. Although the wife co-owned the house, lived in the house, did laundry in the room adjacent to the room which housed the marijuana, and the smell of marijuana permeated the house, the Court found that the wife did not have the capability to maintain dominion and control over the marijuana. Therefore she did not constructively possess the marijuana and the Controlled Substance Excise Tax was improperly imposed against the wife.

In this case, the taxpayer's husband was an active retailer of marijuana. He stated and the police report confirms that he stored the marijuana in a locked safe in the basement. In the afternoon of August 1, 2001, while the taxpayer was at work, the taxpayer's husband was informed by telephone that the police were investigating and arresting the parties associated with the marijuana trade. After receipt of this call, the taxpayer's husband took the marijuana from the locked safe in the basement and put it in the back of the car he normally drove. Then he parked the car, with the marijuana in it, on another person's property before the taxpayer returned home from work. The taxpayer did not have knowledge of the marijuana or access to the car from the time the marijuana was placed in the car until the time the police arrested the taxpayer's husband. When the police arrived at 11:00 p.m. that evening, they questioned both the husband and the wife. The husband showed the police the locked safe where he kept the marijuana in the basement and took the police to the marijuana in the trunk of the car. The police also found \$11,861.00 cash under the couple's mattress. The police arrested the husband.

At the hearing, several witnesses testified that they had been in the taxpayer's home on many occasions including times that they just dropped by without an invitation and never smelled the odor of marijuana. The taxpayer and her husband both stated that the taxpayer did not know how to open the safe, the husband had always stored large amounts of cash in the house because he did not trust banks, and the taxpayer almost never drove the car in which the marijuana was found.

In both the Hall case and this case, the husband kept the marijuana locked in an enclosure to which the wife had no access. Although the odor of marijuana was evident in the Hall's house, the Court still found that the wife did not exercise dominion and control over the marijuana. In the taxpayer's situation, there is even less evidence that the taxpayer knew of the marijuana or was capable of exercising dominion and control over the marijuana. The only indication that the taxpayer possessed the marijuana was that it was stored in the couple's house, it was found in the couple's car, and she was married to the person who actually intended and was capable of maintaining dominion and control over the marijuana. As stated in the Hurst case, those factors alone are not adequate to determine that a person constructively possessed marijuana.

The taxpayer has sustained her burden of proving that she did not actually or constructively possess the subject marijuana.

Finding

The taxpayer's protest is sustained.